

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1550

To be argued by
JULIA P. HEIT

B

P/S

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

CARMINE TRAUMENTI *et al.*,

Appellants.

**BRIEF IN BEHALF OF APPELLANT
HATTIE WARE**

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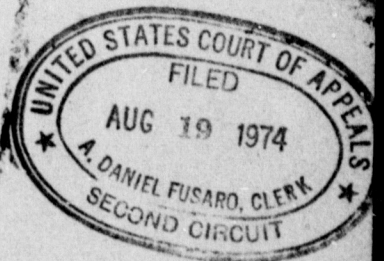


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=====X

UNITED STATES OF AMERICA,	:
Appellee,	:
-against-	:
CARMINE TRAUMENTI, ET AL.	:
Appellants	:

=====X

STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered April 22, 1974 in the United States District Court for the Southern District of New York (Duffy, J.) convicting appellant Ware after trial of conspiring to distribute and to possess with intent to distribute quantities of heroin in violation of 21 U.S.C. Section 841 (a) (1). Appellant was sentenced to five years imprisonment, execution of sentence suspended and she was placed on special parole for five years.

QUESTION PRESENTED

Whether the failure to comply with the Miranda mandate tainted the subsequently seized evidence, thereby requiring its suppression.

STATEMENT OF FACTS

Appellant, HATTIE WARE, proceeded to trial before the Hon. Kevin T. Duffy on an indictment charging her and 30 named defendants with conspiring to distribute and to possess with intent to distribute quantities of narcotics in violation of Sections 173, 174, 812, 841 (a) (1) and 841 (b) (1) (a) of Title 21, U.S.C. According to the Government, the alleged conspiracy encompassed the period between January 1, 1969 through December of 1973.

MOTION TO SUPPRESS

During the trial, a hearing was held to determine the legality of the seizure of several photographs from an apartment at 150 W. 225th Street. These photographs depicted appellant Ware (hereafter referred to as appellant) with the defendant Pugliese.

Before commencement of the hearing, the following stipulations were entered into regarding the issue of whether appellant had standing to contest this issue:

1. That the picture which was subject to the seizure was a picture of appellant.
2. That the lease to the apartment where the pictures were seized was in appellant's name.
3. That appellant leases another apartment in the Bronx where she lives and pays rent.
4. That appellant Ware did not pay any rent at 225th Street.

5. That appellant was not in the apartment when the photographs were seized but only Estelle Hansen was present. (1016-1018)*

On October 3, 1973, Special Agent Martin Maguire went to Apartment 11G at 1380 University Avenue in the Bronx pursuant to a federal arrest warrant that had been issued for appellant. (1021) They entered the apartment forcibly and placed her under arrest. When advised of her constitutional rights, she responded yes after each right was read to her. (1021) She was then taken to their headquarters where she was interviewed by Agent Nolan. (1024)

Before questioning her, Agent Nolan again advised her of her rights but she did not say anything. Appellant was not asked to sign any form acknowledging that her constitutional rights were read to her. (1048) A personal history form which asked for the identity of relatives was then read to her. (1040) Appellant was asked directly if she had a niece by the name of Bunny and she replied that she did. Agent Nolan then asked for her full name and appellant answered Estelle Hansen. When asked if she knew Basil Hansen, appellant informed him that he was Estelle's husband. (1041) When, however, the Agent asked her for the address of Basil Hansen, appellant would not answer. Both Agents Maguire and Nolan

* Numerical references are to the pages of the trial transcript.

acknowledged that appellant at that time appeared very confused and cried on several different occasions. (1036, 1048) Appellant was left alone at that point for thirty minutes while Agent Nolan went through several miscellaneous pieces of papers that had been seized from her pocketbook or wallet. (1049) Agent Nolan then took about a dozen pieces of paper with him and again asked appellant where Basil lived, but appellant would not answer. Upon perusing the papers, Nolan came to a paper with the address 150 W. 225th Street. Appellant was asked who lived there and she stated she would not tell him that. Again she was asked this same question and again she gave the same reply. (1043) At that point, appellant got very emotional and started crying so Nolan left the room and reported to his superiors that it was his impression that the address belonged to Basil Hansen. (1043) The agents were then instructed to go to that address where they seized the photo albums. (1048)

Agent Nolan frankly admitted that before questioning appellant, he did not know the location of the apartment at West 225th Street and determined that location only through his questioning of her. Without such questioning, the apartment would not have been located that night. (1049-1050)

Accordingly, on October 4th at 3:15 a.m., Agent Maguire, accompanied by three other Federal Agents went to 150 West 225th Street with a federal arrest warrant for John Doe alias

"Basil". (1024-1025) They entered the apartment forcibly when no one responded to their knock and observed a vast amount of white powder scattered loose on the floor and large amounts of white powder contained in partially sealed envelopes. Only Estelle Hansen was present. (1025-26) The officers then searched this apartment although they had no search warrant. (1031) Either Agent Moore or Nolan seized the photo album which was on a nightstand in the bedroom. (1025-1026) The album which was a normal 8" x 12" wedding album was closed and the pictures could not be seen unless it was opened. (1034-1035)

Thereafter, during the trial, the Government sought to introduce cancelled checks made out to the landlord of the 225th Street apartment that were signed by appellant and telephone bills from the New York Telephone Company addressed to appellant at that apartment as evidence of her participation in the conspiracy. (2905) Appellant's counsel responded that it was incumbent upon the Government to bring these facts to the attention of the court when the Government at the suppression hearing claimed that appellant lacked standing. The Assistant United States Attorney replied that these documents were shown to him only after the hearing. (2913) Counsel

then informed the court that the Government had now conceded that appellant had standing to contest the legality of the seizure and therefore he moved to re-open the suppression hearing in order to introduce into evidence the following stipulation:

That the lease and cancelled checks and telephone bills which the Government seeks to introduce into evidence were seized in the bedroom on top of a 3-level table with the bottom level having a drawer which was opened by the Agent but nothing taken and upper two levels being open. (2933)

The court later denied the motion to suppress and admitted the pictures into evidence. (3377-3378)

THE GOVERNMENT'S CASE

The Government's case was predicted primarily upon the testimony of Frank Stasi, John Barnaba, Harry Panirello, Thomas Dawson, and Pasquale Provitera. It was only after all these men had been arrested for narcotic violations and were confronted with lengthy prison terms that they agreed to cooperate with the Government. (431, 1238-1239, 2217, 2341-2343, 2965-2966.)*

*Only the facts relevant to appellant's appeal will be set forth.

In March of 1970, Harry Panirello met Pugliese and informed him of his need for money and that he didn't care how he earned it. (2118-2119) His need for money thus prompted Harry's entry into the narcotics business.

First, he stashed some heroin in his attic for Pugliese. (2120) Three weeks later, pursuant to Pugliese's instructions, Harry brought two "shirts" (narcotics) to Pugliese and they both went to appellant's apartment. Present were appellant, Basil, and his girlfriend, Bunny. (2125) Harry left the package on the coffee table and Pugliese and Basil then went into the bedroom for about ten minutes. (2127) Harry also made deliveries to Defendant Greene who lived on the seventh floor in the same building.

Thereafter, during September and October of 1971, Harry engaged in narcotic transactions with Greene, Basil, and Dawson. (2147) Specifically, he had about three or four transactions with Basil at appellant's apartment where he delivered the goods. (2149) Appellant was present when he made these deliveries. (2150)

Three weeks before Pugliese went to jail, Harry met with him at Dilacio's apartment. Pugliese told him that he

was leaving them two kilos of heroin and some cash. Dilacio was to pick up the heroin and take it to the stash. Harry would then take it from the stash and deliver it to the customers. (2154) Pugliese gave him the telephone numbers of Dawson, Greene, appellant, and Dilacio. (2155-2156) Only Dilacio was given DiNaopli's number since Dilacio would be picking up the narcotics from him. (2158)

Dawson and Barnaba thereafter each received one half a kilo and the remainder of the two kilos that Pugliese had left ~~them~~ went to Basil and Greene. (2165-2170) Once Harry delivered one half of a kilo to appellant which was to be given to Basil although he did not know when this was. (2173)

Later, Dilacio told Harry that DiNapoli would give him another kilo for \$22,000. (2175) Dawson received one half of this kilo and the rest went to Greene and Basil whose share was delivered to him at appellant's apartment. (2180)

When they could not get anymore narcotics from DiNapoli, Carmen Pugliese agreed to give them goods on consignment. (2187-2188)

Harry then met Butch Ware (Defendant Alonzo) at appellant's apartment. Butch wanted to get rolling again. Since he didn't have any money, Harry agreed to give him two ounces for \$2000. (2193) Alonzo, however, did not pay the full

amount. Consequently, when Harry saw appellant, he told her to get the money from her brother and she said o.k. (2193) Harry would give appellant \$100 or \$150 four or five different times because he was using her apartment in his dealings with Basil. (2194)

PASQUALE PROVITERA, Harry Pannirello's brother-in-law, got into the narcotics business when Harry told him that he would pay \$200 per delivery to deliver packages for him. (2969) He thereafter delivered packages to Basil in appellant's apartment to Al Greene and to Dawson. (2973-2979) On one occasion, he went to appellant's apartment to make a delivery to Basil. However, when Basil did not appear, appellant told him to leave the package with her and she'd see to it that Basil got it. (2976)

ARGUMENT

POINT I

THE FAILURE TO COMPLY WITH THE MIRANDA MANDATE TAINTED THE SUBSEQUENTLY SEIZED EVIDENCE, THEREBY REQUIRING ITS SUPPRESSION.

- A. The information regarding the apartment where the evidence was seized was obtained as a direct result of the Agents' failure to comply with the Miranda mandate.

Miranda v. Arizona, 384 U.S. 436 (1966) made it quite clear that the Constitution required not only a notice of rights, but also full respect for the exercise of those rights. Once a suspect has insisted on his right to remain silent, the authorities may not undermine this right by repeated requests for him to abandon that right and to supply the desired information:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

384 U.S. 436, 467, 473-74

In the present case, the testimony of the Government's own witness established that when appellant was asked the address of Basil Hansen, she refused to answer. Despite her wish

to remain silent, the agents on two subsequent occasions persisted in asking her for this information and specifically pointed to an address that had been found in appellant's purse, asking who lived there. Although appellant continued to refuse to answer, she evidently was so upset by this custodial interrogation that she broke down and cried. Thus, it was only through her emotional reaction to the continued questioning of the agents that the agents knew that they had obtained the information they had been seeking.

There can be no question that the Agent's conduct in continuing their interrogation of appellant while knowing full well that she wished to remain silent violated the specific mandate of the Miranda decision.

There was no justification whatever on the face of this record for the continued questioning of appellant. Her refusal to talk cannot be construed as ambiguous or equivocal nor did she voluntarily or spontaneously invite further discussion on the matter. In fact, it must be pointed out that the Agents even resorted to the use of the personal history form as a ruse to obtain their information. Further inquiry by the Agents in the face of appellant's unwillingness to discuss the matter was clearly an impermissible infringement of her Fifth Amendment privilege.

In United States v. Crisp, 435 F.2d 354 (7th Cir., 1970) the Seventh Circuit condemned such conduct on the part of law enforcement agents, and such condemnation should apply with equal force to the present case:

Both the letter and the spirit of the Supreme Court's decision in Miranda call for the condemnation of even this seemingly innocuous police conduct. The procedural safeguards imposed in that case were premised upon the observation that custodial interrogation in the absence of defense counsel is inherently intimidating and destructive of free enjoyment of the constitutional privilege against self incrimination. To be effective, those safeguards must be fully observed, and the rights of the suspect must be jealously guarded. Not even the slightest circumvention or avoidance may be tolerated. The rule that interrogation must cease, in whole or in part, in accord with the expressed wishes of the suspect means just that and nothing less. Once the privilege has been asserted, therefore, an interrogator must not be permitted to seek its retraction, total or otherwise. Nor may he effectively disregard the privilege by unreasonably narrowing its intended scope. Emphasis Supplied. 435 F.2d 354, 357.

See also United States v. Priest, 409 F.2d 491 (5th Cir., 1969)

cf. United States v. Slaughter, 366 F.2d 833 (4th Cir., 1966)

cf. United States v. Collins, 462 F.2d 792, (2nd Cir., 1972)

United States ex rel. Dos v. Bensinger, 463 F.2d 576 (7th Cir., 1972)

Finally, it cannot be overemphasized that the information obtained by the agents was obtained only as a consequence of their taking advantage of appellant's highly volatile emotional

state. Miranda held that "A statement taken after a person has invoked his privilege cannot be other than the product of compulsion, subtle, or otherwise". (Id. at 374)

Thus, it must be found that the information regarding the apartment where the evidence was seized was obtained only as a direct result of the Agent's failure to comply with the Miranda mandate.

B. The failure to comply with the Miranda mandate "tainted" the subsequently seized evidence.

As pointed out above, appellant was continually interrogated despite her refusal to answer the questions directed at her. It was only through this constant interrogation of appellant and her emotionally-laden responses that the Agents were able to find the apartment where they seized the evidence. Unquestionably then, it was the Agent's failure to comply with the Miranda mandate which led directly to the seizure of the photographs, and therefore, this evidence must be suppressed as the "fruits" of the Agent's unlawful actions. Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920); Nardone v. United States, 308 U.S. 338 (1939).

This so-called "fruits of the poisonous tree" doctrine was first expounded by the United States Supreme Court in Silver-

thorne Lumber Company v. United States, supra and was followed in the subsequent landmark cases of Nardone v. United States, supra and Wong Sun v. United States, supra. These cases stand for the now well established proposition that any knowledge or evidence gained as a result of the government's own wrong cannot be utilized by it to secure a conviction. The one qualification to this doctrine was succinctly stated by the Supreme Court in Silverthorne:

Of course this does not mean that the facts thus obtained become sacred and inaccessible if knowledge of them is gained from an independent source * * *. supra at p. 392.

See also United States v. Tane, 329 F.2d 848 (2d Cir., 1964);

McLinden v. United States, 329 F.2d 238 (D.C., 1964)

Thus, establishing the primary illegality, for the fruits of the "poisoned tree" doctrine to be operative, a causal chain must be shown to exist flowing from the primary illegality to the procurement of the evidence sought to be suppressed.

It is clear that the "fruits of the Poisonous tree" doctrine must be applied to the facts of the present case since the evidence seized by the Agents was seized only by virtue of the Agent's continual and illegal interrogation of appellant. Agent Nolan candidly admitted that before questioning appellant, he did not know the location of the apart-

ment at West 225th Street and determined that location only through his questioning of her. (1049-1050)

The Government produced no evidence during the hearing that showed or even tended to show that the apartment was discovered or could have been discovered through a source untainted by the admissions.

The conclusion is therefore inescapable that it was the Agent's failure to comply with the Miranda mandate which led directly to the seizure of the photographs. Accordingly, this evidence must be suppressed as the fruits of the Agents' unlawful actions.

C. The admission of the "tainted" evidence cannot be deemed harmless.

An examination of the entire record in this case shows that the photographs which were seized by the Agents at the 225th Street apartment constituted a substantial part of the Government's case against appellant. Under these circumstances, its admission into evidence cannot be deemed harmless error. Chapman v. California, 386 U.S. 18, 24 (1967); Schneble v. Florida, 405 U.S. 427 (1972)

By introducing the photographs into evidence, the Government sought to show that appellant was well acquainted with the Defendant Pugliese, one of the alleged leaders of the narcotic

conspiracy. Absent such evidence, the record show only that appellant was present when a brown paper bag allegedly containing narcotics was transmitted to Basil Hansen in an apartment for which she was paying the rent. There is no evidence that appellant knew that the bag contained narcotics or that she knew that any illegal activity was going on. Any conversations regarding the bag among Basil, Panirello or Pugliese were held privately in the bedroom.

Moreover, although Harry Panirello testified that he once delivered one half a kilo to appellant which was to be given to Basil, this kilo also was in a paper bag. Therefore, the record fails to indicate whether or not appellant actually knew that this bag contained narcotics. The only other evidence connecting appellant to this drug conspiracy was the fact that she received money from Panirello for the use of her apartment and that on one occasion she said she would get some money from her brother which was owed Harry. These facts still do not constitute evidence that appellant was involved in a narcotic conspiracy.

Consequently, the pictures which showed her and Pugliese together at a party had to have a tremendous impact upon the jury. Here was a woman whose alleged involvement in this narcotic ring was at best marginal socializing with one of its alleged leaders.

Thus, it must be concluded that the untainted evidence against appellant was not so overwhelming as to foreclose "a reasonable possibility that the improperly admitted evidence contributed to the conviction". United States ex rel Dos v. Bensinger, 463 F.2d 576, 576 (7th Cir., 1972); Chapman v. California, supra.

POINT II

PURSUANT TO THE FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28 (i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEFS FOR THE OTHER APPELLANTS ARE INCORPORATED BY REFERENCE.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

RESPECTFULLY SUBMITTED,

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